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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ASSOCIATED PRESS, Plaintiff,	**ECF CASE**
- v.-	SECOND SUPPLEMENTAL DECLARATION OF KAREN L. HECKER
UNITED STATES DEPARTMENT OF DEFENSE, Defendant.	05 Civ. 3941 (JSR)

Karen L. Hecker hereby declares, pursuant to 28 U.S.C. § 1746, as follows:

1. I am an Associate Deputy General Counsel of the United States Department of Defense ("DOD"). As noted in my prior declaration, in that capacity, I am responsible for, among other things, overseeing litigation involving the DOD. Unless otherwise indicated, the statements in this declaration are based upon my personal knowledge and information obtained by me in the course of my official duties.

2. The purpose of this declaration is to explain the difficulties that would be involved in asking detainees whether they consent to disclosure of their names and other identifying information redacted from Combatant Status Review Tribunal (CSRT) documents provided to the Associated Press (AP). As described below, polling the detainees concerning the disclosure of their

identifying information would create enormous logistical burdens and would require the diversion, to an intolerable degree, of significant resources away from the military's primary mission at Guantanamo—conducting detention and interrogation in support of the Global War on Terrorism, coordinating and implementing detainee screening operations, and supporting law enforcement and war crimes investigations.

The Difficulty of Obtaining Detainees' Informed Consent

3. Ensuring that any detainees' consent to disclosure be informed could not be accomplished by simply providing each detainee with a one-page letter with a space for his signature. Rather, obtaining a detainee's genuinely informed consent poses a host of practical challenges, some of which are described below.

Difficulty of Formulating and Communicating the Content of an Informed Consent

4. At the outset, composing a written informed consent notice presents unique difficulties, given the detainee population and nature of the information that would need to be conveyed. Some detainees are unsophisticated (many have limited education); others seek to turn to their advantage any action taken by DOD. Many do not trust anything told to them by representatives of DOD. A notice would have to convey, in the detainee's language, factual and legal material in a way that is clear and comprehensive, yet written so that even the most unsophisticated of the detainees could understand what was being asked of them.

5. Any notice would have to explain, at a minimum, the nature of the proposed disclosure and its potential ramifications for the detainees and their families. In addition, the notice would have to explain the nature of the privacy protections FOIA affords individuals identified in government records, and which the detainees could be relinquishing by consenting to AP's requested

disclosure. At the same time, the notice could not provide legal advice on the meaning of FOIA or Exemption 6, or the exemption's application in the particular circumstances presented by AP's request.

6. A form letter is unlikely to answer all the detainees' questions about the meaning and ramifications of disclosure. Experience with the CSRTs and Administrative Review Boards (ARBs) has shown that many detainees had questions about those processes. In those settings, their questions were addressed to the detainee's Personal Representative (in the case of the CSRTs) or Assisting Military Officer (in the case of the ARBs). DOD personnel would likewise have to be made available to answer detainees' questions about any informed consent procedure.

7. To understand what information would be disclosed, detainees could ask for, and would be entitled to see, the transcripts and statements in which their identifying information appears and in which context that information would be disclosed to the public. This would mean translating the transcripts and statements into any number of the 19 languages spoken by the detainees at Guantanamo. To complete such an undertaking would mean diverting the translators available for use at Guantanamo away from their primary work on intelligence and operational matters (as well as the ongoing intensive work being conducted for the ARBs that are being conducted for each detainee on an annual basis), for use in translating the CSRT documents for the detainees. Given the high demand for translators for mission-related matters at Guantanamo, taking them away from that work (even part-time, as the diversion would have to be) would have a significant impact on DOD's ability to have its translation needs met in the crucial areas of intelligence and operations. And it cannot be assumed that the detainees would trust a DOD translator or

translation in any event; some detainees even refuse to consult with their own lawyers, who may have been engaged by next-friends or their own family members.

8. Explaining the potential consequences of disclosure poses an even greater challenge, both because of detainee distrust and because of the impossibility of accurately predicting all the potential consequences of the disclosure AP seeks. DOD believes that identifying a detainee who gave particular evidence to the CSRT could subject the detainee's family, or the detainee himself, to grave harm if terrorists (or other detainees) are dissatisfied by something the detainee said to the Tribunal, or if the detainee is perceived as cooperating or collaborating with the United States government. While DOD could convey this belief to detainees in general terms, it could not possibly discuss with each detainee the particulars of his situation, both because some relevant information may not be disclosable to the detainee and because of the enormous amount of time and preparation it would take to spell out all potential ramifications of disclosure – to the extent they are foreseeable to DOD – for the safety of the particular detainee and his family.

The Burden on Resources Essential to the Guantanamo Mission

9. In explaining these matters, a DOD representative would have to meet with each detainee away from his cell block as it could compromise a detainee's (and his family's) security if one detainee overheard another stating that he did or did not want his name and personal information disclosed. One detainee could think another had something to hide, or could learn that a detainee intended to allow disclosure of incriminating information about him or another detainee. It would take a significant amount of time and resources to move each of these detainees to the limited number of rooms where these meetings could occur. For operational security reasons,

each detainee must be escorted by at least two and sometimes three guards (depending on destination and mode of travel) and multiple detainees cannot be moved simultaneously.

10. There is also no good answer to the problem of who would conduct those private meetings with the detainees. Personnel at Guantanamo are already heavily involved in actions related to its detention and intelligence gathering missions. They are also conducting the ongoing ARBs and are involved with visits by habeas counsel for the detainees. To charge Guantanamo personnel with conducting such meetings would overwhelm their primary responsibilities at Guantanamo and undermine the military's ability to effectively conduct the essential mission of the facility.

11. If a detainee claimed not to understand what was being asked of him after such a meeting, additional meetings would have to be held. And those detainees with lawyers might seek the opportunity to consult with their lawyers on whether to consent to AP's requested disclosure. Either scenario would delay the detainees' ultimate responses for an unforeseeable amount of time.

12. In addition, such an informed consent process would require an overwhelming amount of resources devoted to translation and interpretation. One requirement, as noted above, would be that the CSRT transcripts be translated into any number of detainee languages. In addition, each individual meeting with a detainee would require an interpreter. Furthermore, many detainees are illiterate. For them, DOD could not use a written informed consent document; their consent would have to be sought orally. This would require an interpreter reading to the detainee in his own language whatever informed consent notice DOD were to eventually develop. The illiterate detainees also would not be able to read their CSRT transcripts and written statements. Thus, if

an illiterate detainee asked to see exactly what disclosure he would be consenting to, to treat all the detainees equally DOD would have to provide an interpreter to read the transcripts and written statements to the detainee (while simultaneously interpreting them) orally. As with translators, DOD has a limited number of interpreters available, and their primary mission is to assist with intelligence gathering and other operational matters. And because an illiterate detainee cannot sign a form stating that he understands the information provided to him, DOD cannot ensure that the detainee is consenting based on a full understanding of that information.

The Problem of Detainee Distrust

13. Finally, as noted, many detainees distrust anything said to them by a DOD representative. Some would likely believe that the informed consent process is part of an intelligence gathering operation by DOD. In such cases, the detainee is unlikely to participate at all in the process. It would be impossible to obtain an informed consent from these detainees. Also due to their distrust of DOD (or for other reasons), detainees who initially give consent could seek to rescind it, for example after talking to other detainees about the matter. In such a case, a conflict could ensue among the detainee, DOD, and/or AP over whether the detainee has or has not consented, and it is unclear how such a conflict would be resolved or what the legal implications might be.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 12, 2005.

Karen L. Hecker

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